

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

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	:	
INTERSECTIONS INC, et al.,	:	
Plaintiffs,	:	
	:	
-vs-	:	Case No. 1:09-cv-597
	:	
	:	
JOSEPH C. LOOMIS, et al.,	:	
Defendants.	:	
	:	
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HEARING ON MOTIONS

December 11, 2009

Before: Mag. Judge Theresa C. Buchanan

APPEARANCES:

Michelle J. Dickinson, Counsel for the Plaintiffs

Thomas M. Dunlap and David Ludwig,
Counsel for the Defendants

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1 NOTE: The case is called to be heard at 10:32 a.m.
2 as follows:

3 THE CLERK: Intersections Incorporated, et al.
4 versus Joseph C. Loomis, et al, civil action number 09-cv-527.

5 MS. DICKINSON: Good morning, Your Honor.

6 THE COURT: Good morning.

7 MS. DICKINSON: Michelle Dickinson for the
8 plaintiffs.

9 MR. DUNLAP: Good morning, Your Honor. Tom Dunlap
10 and David Ludwig for the defendants.

11 THE COURT: Good morning. All right this is on,
12 let's deal first with the plaintiffs' motion for sanctions.
13 Did you still want to pursue that?

14 MS. DICKINSON: Yes, Your Honor, I would, please.

15 THE COURT: I am just trying to understand. They
16 are alleging now that there was nothing there?

17 MS. DICKINSON: That's not correct, Your Honor. We
18 still do not have all documents for Joe Loomis or a proper
19 production for Jenni.

20 With respect to Joe Loomis, there are 10,000 pages
21 missing in their production, in his production. Now, the
22 defendants claim that it's the standard practice to remove
23 Bates labeled documents or Bates labeled pages from a
24 production without alerting opposing counsel as to the fact of
25 the removal or the reason for doing that.

1 They also say that the 10,000 pages that are missing
2 from their production, you can actually find them in another
3 portion of the production, but that's not actually accurate.

4 We have a declaration for the Court, if I may.

5 THE COURT: Okay.

6 MS. DICKINSON: This is from DLA Piper's litigation
7 support specialist. And he would testify that this is not
8 only not the standard practice, and the defendants' expert
9 doesn't say it is as well, or their vendor, excuse me, but
10 that as well as that, there are 10,000 pages which were not
11 produced. If you look at the Bates range--

12 THE COURT: Okay, let me read it for just a second.

13 MS. DICKINSON: I am sorry.

14 THE COURT: Let me take one second and just read
15 what he says, it might help me understand your argument.

16 MS. DICKINSON: Sure. Sure.

17 THE COURT: Okay, go ahead. I am sorry.

18 MS. DICKINSON: Your Honor, with respect to the
19 Bates range that they have identified as covering the
20 documents that have been removed from their production, as you
21 can see from Mr. O'Neal's declaration, that Bates number point
22 that they point to is not within the document production that
23 they have given us.

24 The first number, the beginning number of that Bates
25 range doesn't have enough digits in it. And the ending number

1 of that Bates range is higher than any Bates number document
2 they have produced in this case. So, we still don't have all
3 of Joe Loomis' documents.

4 And with respect to Jenni Loomis, we still have a
5 data dump. The Court ordered the defendants to produce on
6 Wednesday, my understanding of the Court's order was that they
7 were to reproduce their documents in order to pull out or cull
8 out the nonresponsive documents. And then to give us a list
9 of the Bates numbers that corresponded with the document
10 requests.

11 THE COURT: Correct.

12 MS. DICKINSON: We did get an over 200-page document
13 that has all of the Bates numbers corresponding to the
14 document requests, and then some ten pages or so of Bates
15 numbers that are identified as nonresponsive documents, but
16 they didn't give us new production.

17 So, what we are left to on the last day of discovery
18 here is-- Well, it was on Wednesday that we got the
19 documents, but we have been in depositions day and night. Is
20 we have to sift through their ten pages of documents in order
21 to figure out whether the documents that we're looking at are
22 responsive or not responsive.

23 It's not a fix for us. We still have a data dump.
24 And here we are on the last day of discovery and they have
25 again or continue to violate the Court's order. I think at

1 this point sanctions are appropriate in this case.

2 We have absolutely taken the high road in this
3 case--

4 THE COURT: So, are you telling me that they didn't
5 actually cull out the documents, they just gave you a list of
6 what was responsive to which interrogatory, I mean to each
7 document request?

8 MS. DICKINSON: Yes, Your Honor, that's what they
9 have given us. But, frankly, that's not very helpful for me
10 as I am trying to prepare exhibits for trial.

11 THE COURT: All right. All right. Let me finish
12 with this motion first. Did you have anything to add to your
13 opposition to that?

14 MR. DUNLAP: Good morning, Your Honor.

15 THE COURT: Good morning.

16 MR. DUNLAP: First off, start with the Bates issue.
17 And I have Mr. Valio, our e-discovery expert, here to speak to
18 the technical issues. I have never seen this affidavit, and I
19 don't know much about the technical aspects of e-discovery.

20 I will note that part of what they are pointing out
21 in their affidavit is a typo, and I believe in our affidavit--
22 I mean, it looks, just from looking at the affidavit in the
23 last 30 seconds, it looks like it is just a typographical
24 error in the number of digits. I don't think the number of
25 digits is dispositive.

1 But, I mean, at the end of the day if the argument
2 is really that those 9,500 blank pages should have been
3 produced, I have Mr. Valio here who can, we can put on the
4 stand and I can certainly ask him questions about whether or
5 not he believes this is standard industry practice and how--
6 You know, why he would think these are part of an Excel
7 document.

8 I, frankly, as a nontechnical person don't know.
9 And I, this wasn't filed as a reply to our opposition, but was
10 just handed to me just now, so I don't have any--

11 THE COURT: All right. And what about Jenni Loomis'
12 production?

13 MR. DUNLAP: With respect to Jenni Loomis, Your
14 Honor, my understanding of the Court's order, which we did,
15 and we hired four contract attorneys that Friday afternoon,
16 had them work through the weekend and through the night--

17 THE COURT: She's right, you were supposed to have
18 taken out the nonresponsive documents.

19 MR. DUNLAP: We identified every nonresponsive
20 document by Bates number.

21 THE COURT: That's not taking them out.

22 MR. DUNLAP: And that was my understanding of the
23 Court's order.

24 THE COURT: Well, you were wrong, because I said you
25 are supposed to produce responsive documents and take out the

1 nonresponsive documents and then correspond them to the
2 document requests.

3 MR. DUNLAP: But, Judge, when they produced to us,
4 they identify--

5 THE COURT: That didn't matter what they did to you
6 because what I ordered you to do was because of your client's
7 nonresponsiveness previously.

8 MR. DUNLAP: Right. And we literally identified,
9 just so you understand what we did, Judge, is we identified by
10 interrogatory request Bates label ranges responsive to each
11 interrogatory request. And then we identified by Bates label,
12 and I understand that I may have misunderstood this, but
13 identified by Bates label what documents were missing.

14 We never got a call about it. If they had called
15 and said, we want you to give these to us with these Bates
16 ranges extracted, we would have just created a new load file
17 and handed it to them.

18 THE COURT: Okay.

19 MR. DUNLAP: We would have handed it to them the
20 same day. We didn't know about it. There was no meet and
21 confer on this.

22 THE COURT: Ms. Dickinson--

23 MS. HUNTER: And, frankly, Judge, this issue with
24 Jenni Loomis was just raised now in court. I mean, it was
25 never raised to us prior to this second.

1 THE COURT: All right, put on your document
2 production expert.

3 MR. DUNLAP: Okay. I would like to call Mr. Ed
4 Valio to the stand.

5 And, Judge, can I give him a copy of this?

6 THE COURT: Sure. All right, Mr. Tucker, would you
7 give him that.

8 EDWARD VALIO, called by counsel for the defendants,
9 first being duly sworn, testifies and states:

10 DIRECT EXAMINATION

11 BY MR. DUNLAP:

12 Q. Would you please state your name for the record.

13 A. Edward Valio. V-a-l-i-o.

14 Q. Mr. Valio, what's your, what do you do for a living?

15 A. I am an e-discovery project manager.

16 Q. Okay. Are you an attorney?

17 A. I am not licensed to practice in Virginia.

18 Q. Okay. Are you licensed to practice in other states?

19 A. Yes, I am.

20 Q. Okay. And have you been retained in this case as an
21 expert to assist with e-discovery?

22 A. Not as an expert.

23 Q. Or as an e-discovery manager?

24 A. Yes, I have.

25 Q. Can you tell me a little bit about your background in

1 e-discovery.

2 A. I am an e-discovery project manager for EndSource IT, a
3 Washington, D.C. based company. Prior to my employment with
4 them, I was a project attorney for various law firms. Prior
5 to that, I was a litigation attorney. Prior to that, I was an
6 extern in a legal department at DuPont dealing with
7 e-discovery issues.

8 Q. Okay. How long have you been involved with e-discovery?

9 A. Approximately five years.

10 Q. Okay. And how many document productions have you been
11 involved with involving e-discovery?

12 A. I couldn't tell you offhand. A large number.

13 Q. Is it hundreds?

14 A. Dozens.

15 Q. Dozens. Okay. And could you take a moment to look at
16 the affidavit produced by counsel in court today.

17 Judge, while he is reading that, I would move to
18 qualify him as an expert in e-discovery.

19 THE COURT: Any objection?

20 MS. DICKINSON: No, Your Honor.

21 THE COURT: All right, he is qualified.

22 MR. DUNLAP: Judge, while he is reviewing that, with
23 respect to Jenni Loomis, I will say this. We can produce that
24 load file by tomorrow morning. I think--

25 THE COURT: Let me ask Ms. Dickinson a question

1 about that Jenni Loomis production because when I quit
2 practicing it was in the dark ages.

3 I am guessing though that if you have a number, if
4 he is giving you a list of responsive documents, that you can
5 look at the Bates numbers that he has given you that are
6 responsive and just put those numbers in on your computer and
7 it will pull up those documents, isn't that correct?

8 MR. DICKINSON: Yes, but we're talking about 16,000
9 pages of documents. And we're talking about over--

10 THE COURT: But you wouldn't be doing the same
11 thing--

12 MS. DICKINSON: I am sorry.

13 THE COURT: Wouldn't you be reviewing the same
14 thing? I mean, I am not quite understanding why it's much
15 more burdensome for you to just look at the list of, you know,
16 numbers of Bates documents and just, you know, say, oh, okay,
17 well, numbers 1005 to 1025 are responsive to request number 1
18 and type in those numbers on your computer and pull them up.

19 MR. DICKINSON: I don't think it's quite that
20 simple, Your Honor.

21 THE COURT: So, that's why I need you to explain it
22 to me.

23 MR. DICKINSON: Okay. So, what they have done is
24 they have given us ten pages or so of listed out in small
25 print of documents that are not responsive, the Bates numbers.

1 THE COURT: That are not responsive or--

2 MS. DICKINSON: That are not responsive. They have
3 given us over 200 pages, an over 200-page document that
4 identifies all of the Bates numbers as they correspond with
5 the document requests, and then they have got like another--
6 Oh, gosh, sorry.

7 THE COURT: Sorry. That's all right.

8 MR. DICKINSON: I talk with my hands. The last 10
9 pages or so are the list of Bates numbers that are not
10 responsive. So--

11 THE COURT: So, what I guess I am trying to say is,
12 the list of documents that are responsive, in that list is it
13 including ranges that include documents that are not
14 responsive?

15 MR. DICKINSON: Can you try that on me again? I am
16 sorry, Your Honor, I am whispering.

17 THE COURT: Okay. He has got a separate number of
18 documents that are nonresponsive, list of documents that are
19 nonresponsive. But when he gives you a list that are, that is
20 a number of say Bates range that is responsive, say 1 to 100
21 is responsive to request number 1, do you then have to go back
22 to the nonresponsive list and look for the numbers within 1 to
23 100 that are nonresponsive? Is that what you are telling me?

24 MS. DICKINSON: Right. I am going to have to go in
25 there and I am going to have to look at their list of

1 nonresponsive documents, and then I am going to have to go
2 into my database and I am going to have to cull all of those
3 documents out, physically cull them out so that--

4 THE COURT: Because they didn't, instead of saying,
5 1 to 5, 10 to 15, and 50 to 100 are responsive--

6 MS. DICKINSON: It's like me walking into your
7 office, Your Honor, and handing you a big stack of documents
8 and saying, numbers 57, 46, 25, 117, et cetera, they are not
9 responsive, go look at the rest of them.

10 Well, now I have got to cull through each page-- I
11 mean, we don't literally do it like this, but, you know, I
12 have got to cull through each page, pull all of those out and
13 then start going through and reviewing the responsive
14 documents.

15 It's really not any different than what we had
16 before. We've got a data dump that's going to take us an
17 enormous amount of time to get through, and we shouldn't have
18 to do that.

19 THE COURT: Okay.

20 MS. DICKINSON: That's the whole purpose of the
21 document request, is for them to-- You know this.

22 THE COURT: I guess I am trying to understand then
23 why didn't you just identify the responsive documents?

24 You can sit down, Ms. Dickinson.

25 Why didn't you identify just the responsive

1 documents?

2 MR. DUNLAP: Well, Judge, the way she describes how
3 you go through it, first, that's not actually how it works,
4 and Mr. Valio can testify to that.

5 The other thing, and I would just like to present
6 this to the Court, but part of the reason we thought that that
7 was okay was they gave us a list of documents that say, don't
8 look at these documents, these are nonresponsive on
9 November 23.

10 THE COURT: All right. Well, I am not going to deal
11 with that today. Let's go ahead and question your expert--

12 MR. DUNLAP: Perhaps Mr. Valio can explain what the
13 process is.

14 THE COURT: Okay, let's go ahead and question your
15 expert.

16 BY MR. DUNLAP: (Continuing)

17 Q. Mr. Valio, you heard what Ms. Dickinson said a moment ago
18 with respect to how these responsive and nonresponsive
19 documents are reviewed, is that correct?

20 A. I did.

21 Q. Okay. Can you describe the process for using Concordance
22 and a load file to exclude the nonresponsive documents when
23 reviewing responsive versus nonresponsive documents in the
24 format that we provided them?

25 A. The format we provided them was, as you know, a list.

1 That didn't have anything to with Concordance.

2 Q. Okay.

3 A. However, within that response, with regard to each
4 document request, every document which was responsive to that
5 request was identified individually as in document request 1,
6 Bates range 1 to 2 of that document. The next document covers
7 Bates range 3 to 4.

8 So, it wasn't simply a range of documents that
9 responded to that request. It was actually each document
10 listed individually by the Bates numbers covered by that
11 document.

12 In addition, at the end each document which was
13 deemed nonresponsive was identified in the same way.

14 THE COURT: Are you telling me then that the
15 nonresponsive numbers were not included as part of the range
16 in the first response that gave the list of responsive
17 documents?

18 THE WITNESS: That's correct.

19 THE COURT: Okay. All right. She is shaking her
20 head no, but go ahead and question him.

21 MR. DUNLAP: Okay. My understanding, Your Honor, is
22 that's how we produced them.

23 The other thing I will offer to the Court and I
24 would have happily offered them today or yesterday is we will
25 produce it without those documents in there, it's not a

1 technical challenge. It is something that we can do fairly
2 easily and we would be happy to do.

3 THE COURT: Okay. All right. Go ahead and question
4 him about the other thing.

5 MR. DUNLAP: Okay.

6 BY MR. DUNLAP: (Continuing)

7 Q. Mr. Valio, have you had a chance to review the affidavit
8 I have given you?

9 A. I have.

10 Q. Okay. There are a number of things in that affidavit,
11 and unfortunately I don't have a second copy, but there are a
12 number of things in the affidavit that refer to the missing
13 pages of documents in this document request.

14 Are you familiar with those missing, with that
15 missing page issue?

16 A. I am familiar with the missing Bates range from this
17 production, yes.

18 Q. Okay. Based on your review of that affidavit, can you
19 explain Mr. O'Neal's response to our assertion that those
20 missing pages were blank and part of an Excel spreadsheet?

21 A. Yes. Mr. Davies' affidavit laid out that there were a
22 pair of Microsoft Excel spreadsheets that had improperly
23 imaged. And in e-discovery issues when you image
24 spreadsheets, you frequently come up with very unusable
25 thousands page long results.

1 And so, it was Mr. Davies' assertion that the
2 imaging of those particular Excel files had not been done
3 properly. And so, they had redone it, and then the Bates
4 range containing the improperly imaged files was removed.

5 Q. Okay. In your experience with document production, have
6 you ever seen that before?

7 A. I have seen the issue with large numbers of pages coming
8 out of Excel files that are unusable.

9 Q. Okay. So that Excel, overproduction of pages with Excel
10 TIFF files is common?

11 A. It's common to encounter errors when attempting to image
12 Excel files, yes.

13 Q. Okay. With respect to the, in the affidavit it
14 identifies some Bates range numbers that seem not to
15 correspond to the production with respect to the TIFF files.
16 Can you speak to those Bates numbers.

17 A. I can't, unfortunately.

18 Q. Okay. How many numbers-- It looks, it looks to me, and
19 I will just ask this, how many numbers are typically in a
20 Bates stamp in this production?

21 A. I don't understand the question, sorry.

22 Q. There is, Ms. Dickinson mentioned a moment ago that there
23 are a certain number of digits in a Bates range label in this
24 document production, and it looks like in the discovery
25 produced that some of the Bates range numbers are different

1 than-- And actually, frankly, I don't understand it because I
2 don't have the affidavit in front of me, so maybe I can just
3 ask you if you can take a moment to look at the affidavit and
4 tell me if you understand what the question is with respect to
5 the Bates range numbers.

6 THE COURT: I think you're talking about paragraph
7 13, correct?

8 MR. DUNLAP: I think so, Judge. Thanks, Michelle.

9 A. Yeah, the assertion in paragraph 13 regarding the
10 particular Bates number is correct. I mean, as far as the
11 format in this case goes, you have got JL followed by looks
12 like seven digits.

13 Q. Okay.

14 A. And that particular Bates number that is cited contains
15 six. So, it clearly is not one that will be associated with
16 this production.

17 What I would look at if someone presented me with
18 this, I might check to see if the zero padding was done
19 incorrectly. So, maybe they are talking about 0031940, but
20 that's probably not the case here either.

21 MR. DUNLAP: Okay. I have no further questions.
22 Please answer any questions Ms. Dickinson has.

23 MS. DICKINSON: May I, Your Honor?

24 THE COURT: To ahead, yes.

25 CROSS-EXAMINATION

1 BY MS. DICKINSON:

2 Q. Mr. Valio--

3 A. Yes.

4 Q. What was your role in the e-discovery in this case?

5 A. I am the e-discovery project manager for the defense
6 attorney.

7 Q. For the defense attorney?

8 A. For the defendants' attorneys, yes.

9 Q. Okay. But particularly what is your role? What are you
10 doing?

11 A. Well, when I was first hired, I was loading Concordance
12 databases of the document productions in this case, which I am
13 sure you are familiar with.

14 And I was also involved in running the review of
15 Jenni Loomis' production in preparation for this, for this
16 document production, as well as an examination of the
17 Intersections database in the context of the redaction issues
18 that had come up between counsel.

19 Q. Okay. So, you have been involved with their document
20 review of the plaintiffs' documents, is that correct?

21 A. No.

22 Q. Or the loading of the documents produced by plaintiffs,
23 is that correct?

24 A. Yes.

25 Q. Okay. And then you have also been involved in some way

1 with Jenni's production, is that right?

2 A. Yes. I helped coordinate the review in preparation for
3 the production that was made.

4 Q. This was the review that happened within the last week or
5 so, is that correct?

6 A. That's correct.

7 Q. Okay. Now, with respect to Joe Loomis' review or Joe
8 Loomis' production, have you had any involvement in that
9 production of document?

10 A. Only in loading up databases. I haven't, I didn't do any
11 of the data processing, if that's what you are asking.

12 Q. Okay. That was done by a completely different firm that
13 was hired by Joe Loomis individually, isn't that right?

14 A. I don't know.

15 Q. Okay, you don't know. So, this declaration of Ken Davies
16 that is before the Court, Ken Davies is not a member of your
17 company, isn't that correct?

18 A. That's correct.

19 Q. Okay. And have you had any conversation with Ken Davies?

20 A. No. I was on a conference call where he was on the call,
21 but he didn't say much of anything.

22 Q. Okay. So, you don't have any real knowledge about his
23 collection of documents for Joe Loomis or his production of
24 documents on behalf of Joe Loomis, is that correct?

25 A. That's correct.

1 Q. Okay. And so, you don't have any real knowledge about
2 this issue of the Bates labeling being off in this latest
3 production, isn't that correct?

4 A. All I would add is that when I went to load up the
5 production of Joe Loomis into, into a Concordance database, I
6 encountered the exact same error.

7 Q. You did?

8 A. There was a gap in the production numbers.

9 Q. Okay. So, you will acknowledge that there was a gap in
10 the production by Joe Loomis, isn't that right?

11 A. There was a gap in the production numbers.

12 Q. In the production numbers. Now, you testified, I
13 believe, or would you agree with me that it is not common to
14 remove Bates numbers from a production without letting
15 opposing counsel know?

16 A. I would agree it is not common to remove Bates numbers
17 from production.

18 Q. At all, right?

19 THE COURT: Say that again. I am sorry. Could you
20 just pull that microphone a little closer. I couldn't hear
21 you.

22 THE WITNESS: I am sorry. I would agree that it is
23 not common to have a gap in those production numbers like
24 that.

25 THE COURT: So, can I ask a question because I think

1 I misunderstood. You were not in charge of Joe Loomis'
2 production at all?

3 THE WITNESS: I did not do any of the data
4 processing.

5 THE COURT: So, when you saw the gap in the
6 documents, you really have no idea why there is a gap either,
7 do you?

8 THE WITNESS: No, but when I--

9 THE COURT: I mean, you can't, you have no way of
10 looking back and seeing what those 10,000 pages actually were,
11 whether they were blanks or not, is that correct?

12 THE WITNESS: That is correct.

13 THE COURT: Okay. Anything else, Ms. Dickinson?

14 MS. DICKINSON: Not particularly on that issue, but,
15 Your Honor, they have been referring to these documents as
16 blank, but as the witness here has acknowledged, I don't think
17 anybody knows whether they are blank or not because we haven't
18 looked at them yet. And they are not in that other portion of
19 the production because the Bates numbers don't sync up with
20 what we have been given.

21 But if I may, with respect to this issue with Jenni
22 Loomis, the documents that, the document that they produced
23 does not provide a Bates range for each one. They provided
24 each individual Bates number.

25 THE COURT: So, you are having to pull up each

1 number?

2 MS. DICKINSON: Exactly.

3 THE COURT: Is that what you are saying?

4 MS. DICKINSON: We would have to input into the
5 computer each individual Bates number.

6 THE COURT: Okay.

7 MS. DICKINSON: So, it's not quite as simple as--
8 It is more of this stacked example that I gave that wasn't
9 quite so artful.

10 THE COURT: Did you have any more questions for this
11 witness?

12 MS. DICKINSON: I don't think so, Your Honor. Thank
13 you.

14 THE COURT: Did you have any redirect for him?

15 MR. DUNLAP: No, Your Honor.

16 THE COURT: All right. You can step down. Thank
17 you.

18 NOTE: The witness stood down.

19 THE COURT: You know, I'm trying to-- Just give me
20 a moment here. I wanted to go back and find your expert's--

21 MR. DUNLAP: And, Judge, I will just mention this,
22 production was done by Mr. Loomis' e-discovery person prior to
23 our firm being primarily in the case. So, I don't have--

24 THE COURT: Well, which is the concern, exactly.

25 MR. DUNLAP: I just don't have as much knowledge

1 about this production. And we got the affidavit today, so I
2 haven't had a chance to give it, obviously, to Mr. Davies to
3 look at and say, well, here's why these problems are here.

4 We have Mr. Valio here, and, you know, that's who we
5 used. But, unfortunately, we just--

6 THE COURT: Wait a minute. I am just trying to find
7 your, Mr. Davies' declaration.

8 MS. DICKINSON: It's Exhibit A, Your Honor. I have
9 a copy here.

10 THE COURT: Could you. And help me just not-- I
11 just want to look at that. I saw it once, and I want to look
12 back at it again and read it specifically. It will save me
13 time. Thank you.

14 Okay. And I can give this back to Ms. Dickinson.

15 MR. DUNLAP: Judge, just one other thing that was
16 just pointed out to me. In the motion, in the motion on
17 page 2 of 6 it says that the 10,000 pages missing are Bates
18 range JL0273745 through JL0283381.

19 THE COURT: Right.

20 MR. DUNLAP: And then in the attachment, in the
21 declaration of James O'Neal which supports that motion, there
22 are completely different Bates ranges, at least it looks like
23 it to me. Just again, reading the numbers at the top. It
24 says production.

25 MS. DICKINSON: That's not right, Your Honor.

1 THE COURT: No, you're looking at-- It's paragraph
2 8. They have the same numbers. You're looking at something
3 different.

4 MR. DUNLAP: I was looking at paragraph 4, Your
5 Honor, that says--

6 THE COURT: No, that's about, that's about other
7 missing images. That's not this.

8 MR. DUNLAP: This set of images.

9 THE COURT: This set. They are referring to other
10 sets that had doc blanks, but this is paragraph 8, they have
11 the right numbers.

12 MR. DUNLAP: I apologize, Your Honor.

13 THE COURT: That's okay.

14 MR. DUNLAP: I just thought--

15 MS. DICKINSON: Your Honor, may I add just one other
16 point.

17 THE COURT: All right.

18 MS. DICKINSON: Just to be clear. We did go look to
19 see if there was a 0 missing. There is no 0 missing.

20 THE COURT: All right. Well, here is what we are
21 going to do. As far as Jenni Loomis' production is concerned,
22 I want you to produce a new load file by Monday close of
23 business with the nonresponsive documents deleted. And make
24 it in a format very simple for plaintiffs' counsel to use.

25 As far as Mr. Loomis' production is concerned, I

1 want you to correct that by the close of business today. You
2 either give them the right Bates numbers or figure out what
3 the problem is with this.

4 It seems to me that I don't see any reason to think
5 that Mr. Davies' declaration in this is false. I mean, he
6 signed it under penalty of perjury. It seems as though this
7 is probably blank pages, but I want you to give counsel a
8 letter by close of business today that corrects these
9 deficiencies or this error in the number and produce, give her
10 the Bates ranges that correspond to the reuploaded images.

11 Now--

12 MR. DUNLAP: So, Judge, just so that I don't make a
13 mistake with this. If we produce the blank images that
14 correspond-- If they are blank. I mean, I honestly don't
15 know. But if we produce--

16 THE COURT: They better be blank.

17 MR. DUNLAP: I understand.

18 THE COURT: I thought he did produce the blanks and
19 he gave you numbers, but the numbers aren't right. That's
20 what I understood him to say.

21 Here what's I want you to do then. Produce the
22 blank pages.

23 MR. DUNLAP: Okay.

24 THE COURT: The original blanks pages with 0273745
25 through 0283381 on the top.

1 MR. DUNLAP: Okay, Your Honor.

2 THE COURT: Produce those by close of business
3 today. Is that a problem? Or Monday, I will give you until
4 the end of Monday.

5 MR. DUNLAP: I think by Monday would be fine, Your
6 Honor. He's in Canada. I don't--

7 THE COURT: All right. Close of business Monday we
8 want those Bates numbers produced. Okay.

9 MR. DUNLAP: Yes, Your Honor.

10 THE COURT: And then, as I said, the new load file
11 for Ms. Loomis.

12 MR. DUNLAP: We will do that as well, Your Honor,
13 absolutely.

14 THE COURT: Okay. I'm going to assume that those
15 are blank pages. We are all going to assume that they are
16 blank pages. If they aren't blank pages, we have got a whole
17 different set of problems.

18 MR. DUNLAP: Judge, I will hope with you.

19 THE COURT: Okay. So, I am going to deny the motion
20 for sanctions at this point. And I am hoping that this is the
21 end of motions for sanctions.

22 Let's deal with your motion to compel discovery at
23 this point.

24 MR. DUNLAP: Your Honor, Mr. Ludwig is going to
25 address that motion.

1 THE COURT: Okay.

2 MR. LUDWIG: Good morning, Your Honor.

3 THE COURT: I am sorry, go ahead. Good morning.

4 MR. LUDWIG: I assume the Court has read the papers,
5 so I will keep my comments brief. There were three essential
6 issues raised in the motion to compel and for limited relief.
7 The first one raised is the issue of improper use of privilege
8 redactions.

9 Due to the protective order in this case, we did not
10 produce exhibits, but I have some examples if the Court would
11 like to inspect.

12 What we saw when we discovered the technical defect
13 and caught glimpses of the first couple of documents that were
14 improperly redacted was that things were being flagged as
15 redacted that were simply not privileged.

16 We also have examples of things that are still
17 currently redacted as privileged that are not listed on the
18 privilege log. And we don't feel that the privilege log is
19 sufficient to evaluate the claims of privilege on documents
20 that we have not seen because we stopped inspecting.

21 THE COURT: Well, I don't see-- When I looked at
22 the privilege log, because the first thing I have to do is
23 look at the log itself to see if it makes a prima facie claim,
24 and it seems to me that it does.

25 So, I am having trouble-- And I will tell you that

1 even before I saw their opposition when I read your motion to
2 compel, I was having trouble with the vagueness of your claim
3 that their, you know, privilege assertions were too broad and
4 so forth when you didn't give me any documents or point to any
5 specific examples. And now when I am looking at their log,
6 their log to me on its face looks sufficient.

7 So, I need to have a specific example.

8 MR. LUDWIG: Understood, Your Honor.

9 THE COURT: Because I am not just going to tell-- I
10 mean, I don't understand what your relief is that you want me
11 to give you in any event. You are just complaining about the
12 possibility of overbroad privilege assertions, and I don't see
13 any specific documents here that you have a problem with.

14 MR. LUDWIG: Well, Your Honor, due to the discovery
15 deadline and the compressed briefing schedule and the parties'
16 protective order, and the fact that all documents produced by
17 plaintiffs have been stamped as confidential pursuant to the
18 protective order, we were unable to file a sealing motion, but
19 I do have examples here for the Court's review if the Court
20 would indulge us.

21 THE COURT: Okay.

22 MR. LUDWIG: These are just three examples we
23 initially discovered.

24 THE COURT: So--

25 MR. LUDWIG: And I will note that none of these

1 documents claimed as redacted are listed on the privilege log
2 at all. And you look on each of these, I think on each of
3 them, there is, the first is the TIFF image, which is what we
4 were supposed to see, and then attached is the metadata, which
5 actually shows the text that was purportedly redacted.

6 THE COURT: So, there is nothing on this that is
7 redacted?

8 MR. LUDWIG: Well, the plaintiffs, I believe, have
9 produced an overlay file that purports to re-redact this. And
10 we were instructed by--

11 THE COURT: No, but I am what looking at here is not
12 redacted. There are some gaps between the paragraphs, but
13 there are no redactions, is that correct?

14 MR. LUDWIG: Your Honor, perhaps we should identify
15 which one we are looking at since there were three sets of
16 documents.

17 THE COURT: I am sorry. I am looking at the first
18 one you handed me, it is dated-- It says, sent from Madeline
19 Vennamin on August 4, 2008. And it then it says Joe. And
20 then there is a little gap. And then there is--

21 MR. LUDWIG: Yes, Your Honor. There was-- This one
22 is particularly interesting. You will see paper clipped to it
23 was another document from the same production in which the
24 portion that was redacted on the top document was actually not
25 redacted in the exact same production. And you can see there

1 that the redacted portion says--

2 THE COURT: Say that again.

3 MR. LUDWIG: The two documents paper clipped
4 together, Your Honor.

5 THE COURT: Yeah.

6 MR. LUDWIG: These were different Bates number
7 documents in the same production. And they contain the exact
8 same e-mail. In one e-mail it's redacted under a privilege
9 claim, and in the other e-mail there was no redaction. And
10 you can see the text--

11 THE COURT: We're not talking about the same thing,
12 I don't think.

13 MR. LUDWIG: Yes, Your Honor, I believe it is the
14 same, the same e-mail. It is--

15 THE COURT: I've got two paper clipped, two sets of
16 two stapled pages and they are paper clipped together, but I
17 don't see where they relate-- I thought you were saying that
18 they were the same e-mail chain.

19 MR. LUDWIG: Yes, they are, Your Honor. The
20 document identified as INTX54135, which was on the top--

21 THE COURT: Okay, I see. I am sorry. I see beyond
22 that.

23 MR. LUDWIG: It is the second message on the second
24 document where it says, Neal, I could remember if you wanted
25 to be object this from a legal perspective, so I did not cc

1 you.

2 That was redacted once in the production, not
3 redacted in the second time it appeared in the production.
4 And I don't see that as a confidential communication for
5 purposes of seeking legal device, legal advice, sorry.

6 THE COURT: Well, what's the problem?

7 MR. LUDWIG: Well, the problem is that we saw these
8 couple of examples, and we can look at the others as well
9 which are also not privileged, and as soon as we discovered
10 that there was a technical defect in the plaintiffs' privilege
11 redaction, we notified the plaintiffs, we contacted Bar
12 counsel and were instructed to not read any further.

13 THE COURT: Good. Right.

14 MR. LUDWIG: But these raised our eyebrows as to
15 improper use of privilege redactions and the privilege log
16 because none of these items that are redacted even appear on
17 the privilege log. So, it was, it was sort of a red flag to
18 us about what else is being withheld. The vast majority of
19 things on the privilege log were not produced in redacted
20 form, they were not produced at all.

21 So, I agree that in several other cases this
22 privilege log does raise a prima facie claim of privilege, but
23 under these circumstances where we are seeing specific
24 examples of abuse of privilege claims, I think we have reason
25 to believe that this was a pattern and course of conduct in

1 their privilege review that ought to be addressed through more
2 specific privilege log or perhaps an in camera review or
3 independent third party review of claims of privilege.

4 THE COURT: Okay. Explain to me this August 4 memo
5 from Ms. Vennamin. You got the portion of it, you got-- You
6 did have part of this produced to you and it was not claimed
7 as privileged, correct?

8 MR. LUDWIG: The--

9 THE COURT: Which part was it? The second part?

10 MR. LUDWIG: The same e-mail-- On that particular
11 one, the same e-mail was produced twice. Well, you can see--

12 THE COURT: The second one with the e-mail chain was
13 produced as not privileged.

14 MR. LUDWIG: Right. The same content was produced
15 two different times in portions of this chain. And one time
16 it was flagged and another time it wasn't.

17 THE COURT: Who are these people in the e-mail?

18 MR. LUDWIG: Madeline Vennamin I believe is an
19 employee of the plaintiff. Neal Dittersdorf is, I believe is
20 an attorney. The two people are attorneys. But what I think
21 we are seeing in some of these redactions is the mere fact
22 that an attorney is included on a communication is used as a
23 basis for a claim of privilege, which--

24 MS. DICKINSON: How do we know that?

25 MR. LUDWIG: Well, we can certainly see it in some

1 of the other documents as well as this.

2 THE COURT: Well, I know, but I am saying-- Okay.
3 This is a communication between two attorneys.

4 MR. LUDWIG: I am sorry, not correct. It's from,
5 from an employee to two attorneys. Ms. Vennamin is not an
6 attorney, but Mr. Dittersdorf and Mr. Dworak are attorneys, I
7 believe.

8 THE COURT: Okay. Why is this not pertaining to
9 legal advice?

10 MR. LUDWIG: Well, it's, it doesn't-- Well, for one
11 thing, this example was really meant to highlight the
12 inconsistencies in the redaction.

13 THE COURT: Okay. So, they made a mistake. I think
14 your client made a bunch of them.

15 MR. LUDWIG: That it was in once and not in once.
16 Arguably--

17 THE COURT: All right, let's go to the next one.
18 Why is that-- You know, I guess what I am getting around to
19 here is they may have made some mistakes in identification, I
20 understand your concern with that, and I appreciate you not
21 looking at documents further that apparently were produced in
22 their entirety when they should not have been or were supposed
23 to be privileged.

24 What specifically in these documents do you believe
25 was not privileged that should have been produced? Because I

1 am not seeing it yet.

2 MR. LUDWIG: Your Honor, if we look at the one
3 document that printed without a Bates number, to Chris
4 Quelena, date of May 18, 2009--

5 THE COURT: Okay.

6 MR. LUDWIG: You will see this was one that we
7 discovered before we stopped reading. And the last two pages
8 of this printout contain the metadata that exists behind the
9 redaction. And the sentence that is redacted says in its
10 entirety, Joe being Joe Flack. I have a hard time believing
11 that that is a confidential communication sent for the
12 purposes of seeking legal advice.

13 THE COURT: Is this some real concern though?

14 MR. LUDWIG: Well, the concern is the global problem
15 because it appears that what was done was a key word search
16 for attorneys names and everything was redacted thereunder
17 without any meaningful review.

18 THE COURT: What do you want me to have them do?

19 MR. LUDWIG: We would like--

20 THE COURT: Review it again?

21 MR. LUDWIG: We would like a meaningful review,
22 document by document of privilege. I think we would also like
23 a privilege log that sets forth the elements of the privilege
24 in greater detail so we can evaluate.

25 These are corporate in-house counsel. So, a lot of

1 material being sent to in-house counsel is not necessarily
2 privileged under Upjohn. And the corporate in-house counsel
3 situation makes it a little bit harder to evaluate privilege
4 in this context. And we have none of that information of the
5 relationship between the parties, how they are in the
6 corporate control group or relevant to the subject matter at
7 the legal advice being sought.

8 We simply can't evaluate the claims of privilege.
9 And again, this type of log may have been acceptable in
10 another case where we didn't have these red flags, but we do
11 know clearly that things are being overredacted, and that's a
12 cause for concern.

13 THE COURT: Okay. And what about the rest of your
14 motion?

15 MR. LUDWIG: We had an issue about a third round of
16 discovery requests. The central request there was a motion to
17 compel copies of the corporation, the plaintiff corporation's
18 e-mail servers. What happened here is that there was an
19 expert report filed by the plaintiffs that stated that a
20 certain e-mail or that implied that a certain e-mail did not
21 exist based on that expert's examination of the sender's
22 laptop and the recipient's laptop as I understand it.

23 It came out on Wednesday at the expert's deposition
24 that the recipient's laptop, I believe, had been restored to
25 factory condition. So, it would not and could not have had

1 any evidence of this allegedly forged e-mail. And we also, it
2 also I believe came out at the expert's deposition that Mr.
3 Loomis' e-mails when he was an employee of the plaintiff
4 corporation were no longer in existence on the plaintiffs'
5 corporation's servers.

6 We have an e-mail from the corporation to Mr. Loomis
7 dated in October of 2008 specifically stating that they would
8 preserve his e-mails. And the plaintiffs were actually
9 claiming work product protection of the investigation of Mr.
10 Loomis going back before October 2008, which implies there was
11 an anticipation of litigation prior to the time when these
12 e-mails must have been removed or deleted from the servers.

13 THE COURT: Well, my question is though, didn't you
14 know all along or at least for quite a long period of time
15 that there was an issue about this e-mail being forged?

16 MR. LUDWIG: We were copied, the last exhibit to
17 plaintiffs' opposition is an e-mail that we were copied on
18 dated September 4, and we had just entered our appearance on
19 October, I am sorry, on August 25. And we, you know, we
20 reviewed that e-mail.

21 We, not being privy to the correspondences that led
22 up to that, if you look at the face of the e-mail, it's, you
23 know, to my reading and to our reading at the time, it was
24 ambiguous. We really didn't know what e-mail was allegedly
25 forged. It just says generally, we believe Mr. Loomis has

1 forged documents.

2 And then the reply from his former counsel says, we
3 would like to see some metadata. We didn't really know what
4 the issue was until the expert reports started coming out more
5 recently.

6 THE COURT: Well, that was kind of a risk that you
7 ran by agreeing to represent this client so late directly,
8 isn't it?

9 MR. LUDWIG: Well, Your Honor, I suppose it is a
10 risk we ran. I don't feel the Court gave us all that much
11 choice in the matter, but--

12 THE COURT: Oh, no, I thought you were going to
13 withdraw.

14 MR. LUDWIG: We intended to and then the Court's
15 order saying that we had to notify any substitute counsel of
16 the Court's intention to impose sanctions on any counsel that
17 substituted in, I think was a hindrance to the client.

18 THE COURT: Well, only if they allowed that sort of
19 conduct to continue to occur.

20 MR. LUDWIG: Your Honor can understand the reticence
21 of other counsel to jump into something like that.

22 THE COURT: All right. Anything else?

23 MR. LUDWIG: We had this third issue about the
24 November 30 deposition.

25 THE COURT: Right. I still don't understand why he

1 couldn't be there. That was the Monday after Thanksgiving.
2 He knew about this deposition it sounds like for about a
3 month.

4 Why couldn't he be there? It's his own brother.

5 MR. LUDWIG: Yeah. My understanding, and I wasn't
6 dealing directly with--

7 THE COURT: I mean, the only allegation here is that
8 he had Thanksgiving plans with his family. Most people were
9 back to work the Monday after Thanksgiving. Why couldn't he
10 be here?

11 MR. LUDWIG: Right. I mean, there can be no doubt
12 that he cleared November 30. The obligation to travel across
13 the country is a five hour flight each way, obviously.

14 THE COURT: So--

15 MR. LUDWIG: So, it implied the night before and the
16 day after being impaired.

17 THE COURT: Yeah, I understand that, but why
18 couldn't he come? I mean, my order was meant to be punitive.
19 My order was meant to impose a burden on the defendant. I
20 would think his own brother would help him out and come here.
21 I don't understand why he is now saying he couldn't do it, not
22 wouldn't do it.

23 MR. LUDWIG: Could I have the Court's indulgence for
24 a moment?

25 I am afraid we don't have any specific details of

1 why he couldn't come. He said he had family obligations.
2 Apparently the two brothers aren't on good terms. Chris
3 Loomis has independent counsel in this matter. He is not, you
4 know, really our witness either, although we believe he has
5 relevant facts.

6 THE COURT: Okay. All right.

7 MR. LUDWIG: Thank you, Your Honor.

8 THE COURT: Anything else? Thank you.

9 Did you have anything else you wanted to add, Ms.
10 Dickinson?

11 MS. DICKINSON: I sure do, Your Honor.

12 If we can talk about the document production issue
13 first. The defendants in this case up until just now have not
14 identified a single problematic document in this case. They
15 have now provided the Court with three, I believe three
16 documents that they say were improperly redacted.

17 THE COURT: You know, skip over the document
18 argument. Let's go--

19 MS. DICKINSON: Can I just make one point, please,
20 Your Honor?

21 THE COURT: Okay.

22 MS. DICKINSON: And that is that we reproduced these
23 documents to them in the ordinary course of our providing, or
24 producing, preparing our privilege log.

25 So, they have-- The reason why these documents

1 aren't on our privilege log is because when we went through,
2 painstakingly through all of the documents that we had either
3 redacted for privilege or withheld on privilege grounds, we
4 decided that these ones needed to be produced in their
5 entirety.

6 THE COURT: Okay. Let me just say as far as the
7 document production is concerned, what the defendants point to
8 here I don't see as major issues to begin with. And you want
9 nothing more than, as I understand it, to make, than to make
10 the plaintiffs go back through and carefully redo this. And I
11 don't see that there is any big problem here to begin with.

12 Even if these were, and I accept Ms. Dickinson's
13 representation that the reason the numbers aren't on the
14 privilege log is because you decided in the end that they
15 weren't privileged, these are not explosive documents, and I
16 don't think that there is anything here that would indicate
17 that they are improperly redacting documents or improperly
18 listing them as privileged.

19 The privilege log, as I said, appears to me to
20 establish a prima facie claim of privilege, and you
21 acknowledge that. I don't think there is anything to do here.
22 And I think that that they've-- I don't see anything proper
23 that I have to compel them to do.

24 So, let's deal next with Mr. Loomis'--

25 MS. DICKINSON: The discovery requests?

1 THE COURT: The discovery requests and Mr. Loomis'
2 deposition.

3 MS. DICKINSON: Okay. Your Honor, with respect to
4 the third discovery requests or third set of discovery
5 requests, they were untimely served on us. Now, they say that
6 it is manifestly impossible for them to have known about these
7 issues in enough time to timely serve us with discovery
8 requests, and that's just not accurate.

9 There is nothing new that prompted these discovery
10 requests. With respect to the forged e-mail, the issue of
11 evidence tampering and specifically that e-mail have long been
12 discussed by counsel since even before this litigation was
13 filed.

14 We served our report in accordance with the
15 scheduling order. And counsel has told us face-to-face that
16 they know of no rule that requires advance notice of an expert
17 report or the existence of an expert.

18 So, there is no issue there with respect to this
19 forged document that would, that would require the Court to
20 extend discovery in this case so that they can get more
21 documents or ask for a copy of server logs.

22 With respect to the document production, we started
23 that document production in September, Your Honor. So, it
24 seems to me that on the last day of discovery to be asking for
25 us to extend the discovery deadline to answer discovery

1 requests that were filed too late or served too late, that
2 seems inappropriate and unfair to me.

3 With respect to the employee termination issue,
4 which is one of the issues that they say prompted, prompted
5 these discovery requests, that was disclosed in a discovery
6 response on September 14. They have had ample time to serve
7 new discovery requests in this case. And indeed, this is
8 their third set. They know how to do it, they just waited
9 until the last minute.

10 The issue here is that the defendants have had
11 knowledge since the beginning of the case. They can't get a
12 mulligan every time they get new counsel and start all over
13 again.

14 Would you like me to address Christopher Loomis?

15 THE COURT: No, that's okay. Thank you.

16 Did you have something else you want to say?

17 MR. DUNLAP: Just briefly, Your Honor.

18 MS. DICKINSON: Your Honor, may I say just one last
19 thing, please?

20 THE COURT: Okay. If you--

21 MS. DICKINSON: You know, we've had a great
22 relationship with counsel in this case, but, Your Honor, to be
23 honest with you, I am offended by the fact that whoever is
24 writing the briefs in that case, in this case on the other
25 side, would suggest, I find it highly ironic that they would

1 suggest that the people on this side of the table are now
2 harassing and threatening them, when I think that we all know
3 what harassment and threats are all about in this case.

4 And to accuse us of bad faith in this case, there is
5 no bad faith on this side of the table, clients or attorneys.
6 And I just find that personally offensive.

7 MR. DUNLAP: Judge, I mean, I didn't write the
8 briefs, but I don't recall seeing that in our briefs.

9 THE COURT: I don't remember seeing it.

10 MR. DUNLAP: I apologize if that was in there, but I
11 don't feel that way about them. So--

12 THE COURT: He likes you, really.

13 MR. DUNLAP: I do.

14 MS. DICKINSON: We like them too. I just don't like
15 what's being said in the briefs.

16 MR. DUNLAP: I just don't recall reading that.

17 MS. DICKINSON: But it's in the briefs.

18 THE COURT: I didn't see that.

19 MS. DICKINSON: I can show you--

20 THE COURT: It didn't strike me that they said that.
21 You can point that out to me. But--

22 MS. DICKINSON: It is page 4, Your Honor, of their
23 reply to motion to compel which was filed yesterday. The say
24 that the irony is that plaintiff now uses that same order to
25 threaten and harass defendants' current counsel with

1 unwarranted motions for severe sanctions based on minor,
2 quickly correctable issues. I mean, come on.

3 THE COURT: Oh, I understand what you are saying.
4 Okay. All right, all right.

5 Well, as I said before, I am hoping that the motions
6 for sanctions are at an end here. I think, Ms. Dickinson, we
7 have resolved it. If there is anything else, I would like you
8 to call counsel first, opposing counsel and see what the issue
9 is before we file another motion for sanctions. But I am
10 hoping that has all been resolved. Unless, as I said, the
11 10,000 pages of documents actually have stuff on it.

12 But I would like you though, as I say that, to make
13 sure that you have verification from Mr. Loomis' expert, Mr.
14 Davies, that if these are blank, that he has reviewed it and
15 it is because of the Excel spreadsheets. Okay.

16 MR. DUNLAP: Yes, Your Honor.

17 THE COURT: Okay.

18 MR. DUNLAP: Your Honor, there is one more thing
19 that's not related to any of this directly, and I know-- But
20 we have to tell the Court, our client last night gave us
21 documents we have never seen before that we feel an obligation
22 to produce.

23 THE COURT: Yeah, you better.

24 MR. DUNLAP: We are going to. But we saw them last
25 night for the first time.

1 THE COURT: You got to be kidding.

2 MR. DUNLAP: So, I wanted to let you know and let
3 Ms. Dickinson know that we are going to produce them
4 regardless of anybody else's feelings on the matter.

5 THE COURT: What do you mean, regardless of anybody
6 else's feelings?

7 MR. DUNLAP: Nothing, Your Honor. I just mean that
8 we are going to produce them. I don't mean anyone in this
9 courtroom. I just mean that we are going to produce them
10 immediately, but we just saw them last night. So, they are
11 coming.

12 THE COURT: So, they should be turned over today. I
13 wouldn't even review them. Just turn over.

14 MR. DUNLAP: We will turn them over today, Your
15 Honor, absolutely. I just wanted to let the Court know that.

16 THE COURT: This is going to be a problem, I
17 guarantee you.

18 MS. DICKINSON: Your Honor--

19 MR. DUNLAP: Judge, if I can just explain where they
20 are coming from and what our client has told us about these
21 documents.

22 He was a confidential informant for the FBI. And my
23 understanding is he had a laptop that he had left in Arizona
24 and was unable to return to Arizona, and just obtained the
25 documents off of that laptop. This is what he has told us,

1 and he has given us an affidavit to that effect. He e-mailed
2 it as 1 a.m. last night. I didn't want to produce it to the
3 Court this morning, but I will produce it.

4 We are going to produce the documents today. That's
5 what he has told us, you know, again, via affidavit. I
6 haven't spoken to him about this yet, but we will produce them
7 right away, Judge, no question without--

8 THE COURT: All right. Look, I am not going to deal
9 with this now. Let me just get through these motions. This
10 is a big problem, obviously.

11 MS. DICKINSON: It is a huge problem, Your Honor.

12 THE COURT: It is, I understand that, but I am not
13 going to deal with it now, Ms. Dickinson. He is going to
14 produce them to you today.

15 MR. DUNLAP: Absolutely, Your Honor.

16 THE COURT: I will hear any emergency motions that
17 you need to file regarding those documents, you obviously
18 can't file it today for next Friday. So, if you decide that
19 you need to file an emergency motion concerning those
20 documents, contact my law clerk and we will set up a special
21 date to hear it. Okay.

22 MR. DUNLAP: Judge, I would just ask if there is a
23 problem with the production itself from how we have given it
24 to them or something like that, to let us know.

25 MS. DICKINSON: We will.

1 THE COURT: Okay. All right.

2 MR. DUNLAP: We will absolutely do everything we can
3 to fix it on our side.

4 THE COURT: I would like you to turn it over
5 immediately.

6 MR. DUNLAP: We will. We will turn--

7 THE COURT: Without regard to that.

8 MR. DUNLAP: It's only like 50 documents.

9 THE COURT: And then we can fix the problem with it
10 right away.

11 MR. DUNLAP: How many documents is it? It's like 20
12 or 40 documents.

13 THE COURT: Not many? All right.

14 MR. DUNLAP: It's not many.

15 THE COURT: Okay. Now, you understand what you are
16 supposed to do with regard Mr. Loomis' missing pages and Ms.
17 Loomis' new load file and Mr. Loomis' missing pages.

18 As I said, I am going to deny the motion for
19 sanctions at this time.

20 As to the motion to compel. I think I was starting
21 to say that I don't see any real problem with their privilege
22 log. I don't see any problem with the documents that you
23 identified. And I am going to deny the portion of the motion
24 that deals with the, with the privilege log and the motion to
25 compel the documents.

1 As to the order regarding Mr. Loomis, as I said
2 before, that was meant to be punitive. Counsel has been
3 unable to give me any good reason why he could not be here on
4 November 30 after the Thanksgiving holiday.

5 So, that still stands, my ruling that he could not
6 testify at trial.

7 As to the additional discovery--

8 MR. DUNLAP: Judge, can I just ask you a quick
9 question on that? Does that mean that he can't testify for
10 either side, or just if we want to call him? It's just--

11 THE COURT: He can't testify for you.

12 MR. DUNLAP: Understood, Your Honor.

13 THE COURT: As to the additional time to get
14 discovery on the alleged forged e-mail, I understand you have
15 been scrambling. And all I can say is I hope you got a big
16 enough retainer up front to cover all your costs in this
17 litigation.

18 But this is something that was disclosed early on.
19 I understand perhaps you didn't understand it until late, but
20 that's not your fault, that's your client's fault. So, I am
21 not going to allow additional discovery as to that, it's too
22 late.

23 So, your motion to compel is denied.

24 Oh, Lord. I hope those 20 pages are totally
25 inconsequential.

1 Now, Ms. Dickinson, as far as the motion for
2 sanctions is concerned, I don't want to see it just because
3 you got documents late when we are talking about 20 to 40
4 pages.

5 MS. DICKINSON: Understood.

6 THE COURT: It has to be something substantive in
7 those documents.

8 MS. DICKINSON: Absolutely, Your Honor.

9 THE COURT: Okay.

10 MS. DICKINSON: Understood. Thank you.

11 THE COURT: Thank you. All right, court stands in
12 recess.

13 NOTE: The hearing concluded at 11:29 a.m.

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15 C E R T I F I C A T E o f T R A N S C R I P T I O N
16

17 I hereby certify that the foregoing is a true and
18 accurate transcript that was typed by me from the recording
19 provided by the court. Any errors or omissions are due to the
inability of the undersigned to hear or understand said
recording.

20 Further, that I am neither counsel for, related to,
21 nor employed by any of the parties to the above-styled action,
and that I am not financially or otherwise interested in the
outcome of the above-styled action.
22

23 /s/ Norman B. Linnell
24 Norman B. Linnell
25 Court Reporter - USDC/EDVA